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BRIEFS

No. 10-1305

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IN THE

Supreme Court of the United States

SHELLEY EVANS-MARSHALL,
Petitioner,

v.

BOARD OF EDUCATION OF THE TIPP CITY EXEMPTED VILLAGE SCHOOL DISTRICT, CHARLES T. WRAY, AND JOHN T. ZIGLER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION FOR REVIEW

Should *Garcetti v. Ceballos*, 547 U.S. 410 (2006) be extended to hold that all in-class speech by teachers in the public schools is categorically unprotected by the First Amendment?

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STATEMENT OF THE CASE

The Respondents begin their Brief by using the words of Mark Twain as purported support for their assertion that local school authorities must have the unrestricted power to terminate a teacher for every word she or her students say in her classroom if they are to discharge their statutory duty of controlling the curriculum of the schools.

We can only imagine the words that Twain—the great opponent of censorship and of moral cant of

all forms—would use to describe the Respondents' arguments and of their attempt to draft him into supporting those arguments.

But we have neither the time nor the interest in engaging in literary reconstruction or in a tit-for-tat response to the Respondents' many claims. We begin and focus throughout on the Respondents' core claim that Tipp City's termination of Shelley Evans-Marshall should be held lawful because they must have absolute power to prevent teachers like her from usurping a school board's control over the high-school English curriculum.

Of course, the Respondents offer *no* evidence for their claim that Evans-Marshall made such an attempt. The books that she assigned—including *Fahrenheit 451* and *Siddhartha*—had been selected by the persons to whom the District had delegated that task. And the planned book-banning debate was obviously one of the countless exercises that good teachers use to explicate the meaning of books like *Fahrenheit 451*. As to the Creative Writing Class, the District does not dispute that it gave Evans-Marshall full control over the materials and assignments that she used. How Evans-Marshall attempted to usurp anyone's power is left unsaid—because it is untrue.

In fact, the Respondents' objections are—and always have been—to the *ideas* that Evans-Marshall and her students discussed *while studying the established curriculum*. The principal objected to some students' choice of debating *Heather Has Two Mommies* because he decreed that "alternative families" were "off limits." Similarly, he objected to the use of *Siddhartha* after some angry parents told the school board that acknowledging the existence of sex outside

marriage should be off limits. And the principal was aghast at the students' papers not because Evans-Marshall had allowed her students to write fictional accounts of a crime, but because one student chose to write about the traumatic consequences of rape and another chose to write about the moral and psychological complexities of a political assassination.

The Respondents terminated Evans-Marshall not because she strayed from the curriculum, but because of the ideas that she and especially her students discussed as a result of that curriculum. The question of protection for free speech in a classroom is presented here in an almost chemically pure form.

Of course, the Respondents attempt to obscure the clarity of the facts by lobbing stray charges in the Petitioner's direction. Four times they assert that she tried to force her views upon students by "punishing" a child for asking for an alternative assignment to *Siddhartha*. Resp. Br., at 13-15, 22. As evidence for this claim, they offer only a videotape record of a comment from the audience at a school board meeting. Resp. Br., at 14, citing Apx., at 3a. The truth is that Evans-Marshall offered the student the choice of reading an expurgated version of *Siddhartha*—which with the student first agreed to before ultimately deciding to read the book itself. R. 31-1, at 28-29.

The Respondents next assert that Evans-Marshall disrespected the principal by asking him if she had to ask "Daddy" for permission to copy papers and by arguing with him over the nature of the exam that she planned to give in one of her classes. Resp. Br, at 18-19. Absent from the Respondents' account is Evans-Marshall's apology for her sarcastic remark, her compliance with the directive on the exam, and

the entire context of incessant hounding by the principal that led to these incidents in the first place. But far more importantly, absent from the Respondents' Brief is any claim that the squabbles that it retells had, or possibly could have, any effect on the Sixth Circuit's conclusion that the evidence as a whole when assessed in the light most favorable to the Petitioner was more than sufficient to show that the Board terminated Evans-Marshall's contract *because* of the ideas that she and her students expressed in her classroom. Apx., 12a-13a.

In lieu of a direct attack on that unassailable conclusion, the Respondents indirectly attempt to impeach it by asserting that Evans-Marshall's case was "fully reviewed by Ohio's courts and her termination was ruled lawful." Resp. Br, at 22. But the Ohio court's decision, which the Respondents have attached to their Brief, declares that its review was "wholly procedural" and that it had *not* reviewed the merits of the termination because the "determination of whether or not to reemploy a teacher is at the board's discretion and [is] *not* a proper subject of judicial review." Resp. Br., at 11b (emphasis added).

If the Respondents have no basis for attacking the factual conclusions which the Sixth Circuit reached—and they have offered no such basis—they should have said so and based their legal arguments on the Sixth Circuit's considered judgment that Evans-Marshall had produced evidence sufficient to prove the following key facts:

> (a) Evans-Marshall was terminated because of the ideas expressed in her classroom,
>
> (b) those ideas clearly involved matters of public concern, and

(c) Evans-Marshall's interest in discussing those ideas clearly outweighed any of the Board's asserted reasons for suppressing that speech.

Apx., at 11a-13a.

Instead of basing their arguments on those facts, however, the Respondents have attempted to run away from them.

REASONS FOR GRANTING THE PETITION

I. THIS CASE SQAURELY PRESENTS THE VITAL QUESTION, LEFT OPEN IN *GARCETTI*, OF WHETHER A PUBLIC SCHOOL TEACHER'S IN-CLASS SPEECH IS CATEGORICALLY UNPROTECTED BY THE FIRST AMENDMENT.

A. The issue that *Garcetti* left open.

In her initial Petition, Evans-Marshall asserted that this Court should grant review because there is a clear split in the circuits and because the decision below addressed a vital issue left open by this Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In response to both of those reasons for granting the writ, the Respondents have overwhelmingly relied on the assertion that the question left open in *Garcetti* was solely its application to speech by professors in public colleges and universities. Resp. Br. at 22-23; 30. According to the Respondents, the "express language" of *Garcetti* makes clear that is the sole open question. Resp. Br., at 30. The Respondents assert that there is, in fact, no doubt that *Garcetti* "did not leave unanswered its application to primary and secondary public schools." Resp. Br. at 27.

Because these assertions are crucial to the Respondents' answer to both reasons that the Petitioner has offered for granting the writ, we begin with the question of what *Garcetti* actually left open.

The express language, which is quoted in full in the Petition, describes the unanswered question as follows: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id.*, at 425. But the Respondents contend that the "express language" actually should have been that the Court had not established the rule for a case involving speech related to scholarship or teaching *in a public university or college.*

The Respondents justify inserting those six emphasized words by the following route. Justice Souter's dissent was concerned that *Garcetti* had defined the "ostensible domain beyond the pale of the First Amendment" in a way that was "spacious enough to include *even* the teaching of a public university professor. . ." *Id.*, at 438 (emphasis added). But, the Respondents declare, the majority reassured him by stating that there may be additional constitutional interests that are involved in expression "related to academic scholarship or classroom instruction." *Id*, at 425. So, because the majority wanted to reassure Justice Souter, its words should be defined by his concerns—which were solely related to college teachers.

This analysis simply collapses. In *any* case, the dissent does not define the scope of the majority's opinion. Moreover, in *this* case, Justice Souter was *not* solely concerned with college teachers. He objected to the entire holding in *Garcetti* and cited college professors as the extreme example of what

he thought was wrong with the majority's entire decision.

Indeed, in doing so, Justice Souter cited cases that he and the majority obviously knew protected the First Amendment rights of high-school teachers. *Id.*, at 439 (Souter, J., dissenting, citing *Shelton v. Tucker*, 364 US. 479 (1960).

In fact, this Court has *never* held that the constitutional interests protected by the First Amendment apply to college professors but not to high-school teachers. Repeatedly, and in particular in the historic cases that the Respondent ignores, the Court has applied its precedents establishing First Amendment rights in high schools to analogous cases in college—and vice versa. See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (elementary and secondary students); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)(college professors); *Shelton* (high schools); and *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967)(college professors).

If this Court, for the first time in its history, had intended to say that in-class speech by college professors might be protected by the First Amendment but speech by high school teachers definitely was not so protected, it would not have done so in the disguised and distorted way described by the Respondents. Indeed, the claim treats this Court's opinion in the way that men once treated the pronouncements of the Great Oracle at Delphos: the majority said its decision did not apply to "classroom instruction or scholarship," but it actually meant that it did not apply to classroom instruction *in a university* because Justice Kennedy was responding to Justice Souter who was mainly concerned with college professors.

The federal circuits have apparently not been trained in reading such entrails. The Fourth Circuit, for example, in considering the rights of a high-school teacher, declared that *Garcetti* ". . . explicitly did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching." *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n. 11 (4th Cir. 2007), *cert. den.* 552 U.S. 950 (2007). The Third Circuit expressed similar doubt as to whether *Garcetti* applied to speech by high-school coaches. *Borden v. School District of the Twp. of East Brunswick*, 523 F.3d 153, 171 n. 13 (3rd Cir. 2008). So, too, did the Second Circuit as to high-school art teachers, *Panse v. Eastwood*, 303 F. App'x. 933 (2d Cir. 2008). Indeed, so, too, did the district court in this case, Apx., at 38a-41a—and if the question was clearly decided in *Garcetti* there is no explanation for the Sixth Circuit mighty labors to justify its answer to a question that had already been answered.

By any standard, the *Garcetti* majority's declaration that it had not decided whether and how its rule applied to "classroom instruction" means that it had not decided whether and how its rule applied to classroom instruction at Tippecanoe or any other high school in the country.

B. The fundamental importance of the question left open in *Garcetti* and presented here.

After asserting that *Garcetti* had settled the question, the Respondents assert that the Petitioner also failed to take guidance from this Court's pre-*Garcetti* decisions, including in particular its decision in *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260 (1988).

In that case, this Court held that ". . . school officials may impose *reasonable* restrictions on the speech of students, teachers, and other members of the school community," so long as their actions are "*reasonably* related to legitimate pedagogical concerns." *Id.*, at 267, 273 (emphasis added). Leaving aside whether *Hazelwood* is the proper standard for speech by teachers, it is obvious that there is a vast difference between saying that a teacher's speech may be limited by *reasonable* restrictions related to *legitimate pedagogical concerns*—and the holding of the Sixth Circuit declaring that in-class speech by a teacher is categorically unprotected by the First Amendment.

The difference—which is fundamental—is why the question left open in *Garcetti* and presented here is of fundamental importance. As the Respondents' simply fail to recognize, allowing school authorities to discharge teachers for *any* in-class speech *does* open the door to the suppression of dissent, the promulgation of a state-enforced orthodoxy, and the end of classrooms that are a "market place of ideas." In fact, that is what happened here: the marketplace of ideas was closed to any recognition of the existence of lesbian parents or of the evident fact that sex has occurred outside of marriage in all places and at all times in world history.

Indeed, as if underlining the danger, five days before the Respondents filed their Response, the Tennessee Senate passed a bill forbidding teachers and students in grades K-8 from even discussing the fact that some people are gay. "Tennessee Senate OKs Ban on Teaching Homosexuality," *San Francisco Examiner*, May 20, 2011 (AP story). The issue is not now whether that law will be passed—but whether,

U.S. at 487. That declaration—which *is* implicit or explicit in every decision from *Barnette* to *Hazelwood*—argues that this Court should review on the clear record here presented the question of whether the constitutional rights of teachers to speak and students to hear can *ever* be protected under a rule of law that says that a teacher may be fired for any word she or her students say in the midst of a discussion of the assigned curriculum. Indeed, the question is here presented with exceptional clarity because the issues discussed—the existence of lesbian parents, of sex outside marriage, and rape and the moral and psychological aspects of assassinations—are at the absolute core of the speech the First Amendment was intended to protect.

CONCLUSION

For the reasons stated, the petitioner Shelley Evans-Marshall requests that this Court grant the writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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